# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, Respondent, v. ABDIRAHMAN S. SAKAWE, Appellant. | ) | No. 61834-2-I |
| | ) | DIVISION ONE |
| | ) | UNPUBLISHED OPINION |
| | ) | FILED: June 15, 2009 |

GROSSE, J. — The confrontation clause of the Sixth Amendment does not bar the introduction of statements offered for reasons other than to prove the truth of the matter asserted. Because the 911 caller's statement at issue in this case was not admitted to prove the truth of the matter asserted, admission of the statement neither violated the confrontation clause nor was contrary to the Supreme Court's holding in Crawford v. Washington.[1] We affirm.

FACTS

Abdirahman Sakawe appeals his convictions of second degree robbery, attempted second degree robbery, and second degree assault.[2] The convictions arose out of an incident on November 22, 2007, in Des Moines. On that evening, while waiting at a bus stop, two Taiwanese exchange students, Chuan "Andre" Chuang and Ka "Charles" Chen,[3] were approached by a group of between five and ten black males.

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[1] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[2] The attempted second degree robbery conviction merged with the second degree robbery conviction.

[3] We refer to these men as "Andre" and "Charles," respectively, as they were referred

The group surrounded Andre and Charles and asked them for a cigarette. When Andre and Charles replied that they had no cigarette, one of the men grabbed Charles by the throat and tried to grab his cell phone. Andre testified that the man was wearing a red hat. Andre grabbed the elbow of the man who was choking Charles and another man grabbed Andre's throat and started punching him. Another member of the group took Andre's cell phone.

Both Charles and Andre managed to get away from the group and began to run toward the Garden Suites hotel, where Andre lived. Two of the members of the group followed them. When Andre and Charles got to the hotel, Charles handed his cell phone to the hotel desk clerk for safekeeping. One of the men followed Charles and Andre into the hotel lobby while the other stood outside the hotel door. The man who went inside the hotel punched Andre and tried to jump over the counter to grab the cell phone from the desk clerk, but was unsuccessful. Both men then fled on foot.

The police were called to the hotel, and Andre and Charles told them what happened at the bus stop. The officers requested the hotel's surveillance video and watched the events that had occurred in the lobby. The video showed that the man who entered the lobby and assaulted Andre was wearing a red hooded sweatshirt underneath a black jacket and the man who waited outside the hotel was wearing a white hood pulled close to his head.

While they were viewing the video, the officers received another 911 call stating that a group of approximately ten black males was about four or five blocks away from the officers and that the men were talking about having a gun and possibly stealing a

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to during trial and as the parties refer to them on appeal.

car. Because of the similarity between this reported group and the group that surrounded Andre and Charles at the bus stop, and because of the nearness of the two locations, the officers left the hotel and went to the reported location to see if anybody in that group fit the description of the two individuals the officers saw in the hotel surveillance video.

The officers found two black males standing at the reported location. The officers recognized one of the men as the one shown in the video wearing a white hood and waiting outside the hotel. The officers did not recognize the other man. The officers detained the men, and a weapons pat-down of the man the officers did not recognize, Shirwa Muse, yielded a cell phone. The police brought Andre and Charles to the scene, but neither of them could identify either of the men as being involved in their assault and robbery. Andre did, however, identify the cell phone taken from Muse as belonging to him.

The officers handcuffed Muse, but he slipped the handcuffs and ran away. The officers called a K-9 officer from Auburn to begin a dog track of Muse. The dog followed a scent trail to bushes about 15 feet from where the dog first picked up the trail. The dog located Sakawe hiding in the bushes and bit him. Sakawe was transported to the hospital for treatment. The Des Moines police directed the Auburn officer, who was at the hospital getting information for his report, to collect Sakawe's red hooded sweatshirt and black jacket as evidence.

The State charged Sakawe with second degree robbery, attempted second degree robbery, and second degree assault. A jury returned a verdict of guilty on all

three counts. Judgment was entered on the verdict, and the court imposed a standard-range sentence.

ANALYSIS

Sakawe argues that the admission of the statement of the 911 caller violated his Sixth Amendment right to confrontation and was contrary to the United States Supreme Court's holding in Crawford. We disagree.

We review alleged violations of the confrontation clause de novo.[4] In Crawford, the Supreme Court held that the admission of out-of-court testimonial statements violates a defendant's right under the confrontation clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[5] However, the Court in Crawford specifically retained the rule of Tennessee v. Street[6] that the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[7]

> There is no doubt that Washington decisions following Crawford recognize that "[w]hen out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no [c]onfrontation [c]lause concerns arise." "[E]ven testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted."[8]

Here, the 911 caller's statement was not admitted to prove the truth of the matter asserted. Rather, it was offered to prove why the officers left the hotel and proceeded

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[4] State v. Tyler, 138 Wn. App. 120, 126, 155 P.3d 1002 (2007).
[5] Crawford, 541 U.S. at 68.
[6] 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985).
[7] Crawford, 541 U.S. at 59 n.9, 60 (citing Street, 471 U.S. at 414).
[8] In re Theders, 130 Wn. App. 422, 433, 123 P.3d 489 (2005) (quoting State v. Mason, 127 Wn. App. 554, 566 n.26, 126 P.3d 34 (2005)) and State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844 (2005), aff'd Davis v. Washington, 547 U.S. 813 (2006) (footnotes omitted).

to the location of the reported group of black males to continue their investigation of the incident involving Charles and Andre. Because the statement was not offered to prove the truth of the matter asserted, no confrontation clause concerns arise. The admission of the 911 caller's statement did not violate Sakawe's rights under the confrontation clause and was not contrary to Crawford.[9]

Sakawe also argues that, even if the confrontation clause was not violated by the admission of the 911 caller's statement, its admission was error because it was not relevant and because, if relevant, any probative value was substantially outweighed by the danger of unfair prejudice to him. We agree with the State that Sakawe has waived this issue.

A party may assign error on appeal only on the specific ground of the evidentiary objection made at trial.[10] This rule gives the trial court the opportunity to prevent or cure the error.[11] Where a party fails to object on proper grounds to the admission of evidence or fails to move to strike, the evidentiary issue is not properly before this

[9] Because the 911 caller's statement was not introduced to prove the truth of the matter asserted, no confrontation clause concern is present regardless of whether the statement was testimonial or nontestimonial. We note, however, the Supreme Court's holding: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis v. Washington, 547 U.S. at 822; see also Tyler, 138 Wn. App. at 127 ("The key difference, according to the court in Davis, is whether the statements are taken to establish a past fact or whether they describe current circumstances requiring police assistance.").

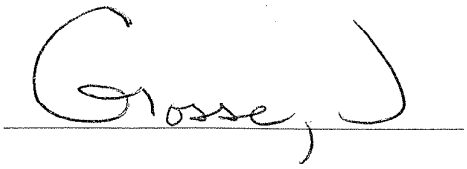
[10] State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); State v. Stevens, 58 Wn. App. 478, 494, 794 P.2d 38 (1990).

[11] State v. Madison, 53 Wn. App. 754, 762-63, 770 P.2d 662 (1989).

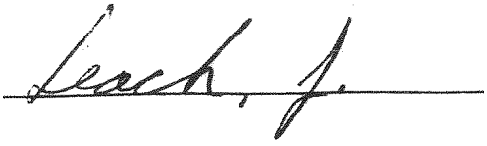
court.[12]

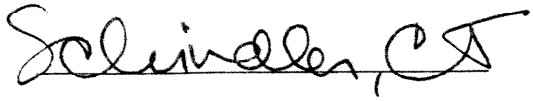
Here, during trial, Sakawe objected to admission of the 911 caller's statement on the grounds that the officer testifying about the statement lacked personal knowledge and the statement was hearsay. Sakawe argues that he preserved the issue for review by virtue of the statement in his trial memorandum: "Here, the State should not be permitted to introduce any hearsay evidence in order to show why the police took the subsequent action that they did." It is clear, however, from the trial memorandum that the only evidence to which Sakawe's argument was directed is a taped statement of one of the suspects. Sakawe's argument in the trial memorandum for the exclusion of evidence was not addressed to the 911 caller's statement. Sakawe failed to object at trial to the admission of the 911 caller's statement on the grounds of lack of relevance or unfair prejudice. The issue is, therefore, not properly before this court.

We affirm.



WE CONCUR:





[12] Stevens, 58 Wn. App. at 494.